# No. 12,594

IN THE

# United States Court of Appeals

## For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,

*Appellants,*

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

*Appellees.*

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

*Appellants,*

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

*Appellees.*

## Petition of P. G. Taylor, et al., Appellants, for Rehearing and Argument in Support



CONNER & JONES
By GERALD JONES
303-7 Valley National Building
Tucson, Arizona

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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## Petition of P. G. Taylor, et al., Appellants, for Rehearing and Argument in Support

P. G. Taylor, et al., appellants, respectfully petition the court for a rehearing on the following grounds:

(1) The court erred in holding that the issue of election of remedy was properly tried by the Court;

(2) The court erred in holding that the issue as to identical employ (to use the court's apt expression) was properly tried by the court.

(3) We realize that no argument could be advanced in support of our specifications of error, 1(a) and 1(b), (wherein we contended that on the undisputed evidence we were entitled to the judgment of the court that we were in identical employ with Appellee, John E. Hubbell, that said Appellee did elect to accept compensation, and that said Appellee had not exhausted his remedies through the Commission) that would not be repetitious of what we have already stressed; and, so, without abandoning those contentions, we merely mention them to preserve our rights.

## ARGUMENT

So far as our specifications 2(a) and 2(b) are concerned, the court, as we understand the opinion, agreed that there was substantial evidence pro and con on the issues of election of remedy and identical employ but held that we were not entitled to have those issues submitted to the jury.

Hence, our grounds (1) and (2) above.

In answer to our specifications 2(a) and 2(b)—that if there was substantial dispute in the evidence on said issues, we were entitled to a trial by jury thereon—no point was made by Appellees in their brief that such issues, or either of them, were for the Court's exclusive determination. On the contrary, Appellees' counsel cited as correctly stating the rule as to identical employ the following:

> "As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one

of fact for the determination of the jury; otherwise the question is one of law for the court." 56 C.J.S. P. 92.

The judgment consequently is affirmed on a theory evolved by the court—one which we at no time heretofore have had an opportunity to consider or discuss.

The court's statement:

"It is axiomatic that 'every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.' (Texas & Pac. Ry. v. Gulf Ry., 270 U.S. 266, 274 (1926); see Rhode Island v. Mass., 12 Pet. (37 U.S.) 657, 718-720 (1838).) Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were 'not in the same employ' and if plaintiff had not made an election under the statute to take compensation. (S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931). Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury. (See Weaver v. Martori, 69 Ariz. 45, 208 P.2d 652 (1949); State v. Phelps, 67 Ariz. 215, 193 P.2d 921, 924 (1948); Dolese Bros. v. Tollett, 162 Okla. 158, 19 P.2d 570 (1933)."

We submit that this is an incorrect interpretation of the Arizona statutes and decisions.

### Subject Matter of This Action

The subject matter of this action is a claim at common law for personal injuries due to negligence. While the plaintiffs alleged the employment of John Hubbell by the power company and alleged affirmatively that Sanderson and Porter were independent contractors and also that any

purported election on his part to take compensation was not binding on him, there was no need or occasion for those allegations. A simple complaint alleging the negligence of Sanderson and Porter would have placed his case in court. This would have required the defendants to allege affirmatively identical employment and/or election by Mr. Hubbell to take Compensation.

It is respectfully submitted that those issues in such a case would be, and that in this case they were, such as might be raised by a denial of negligence, a plea of contributory negligence, release and discharge, etc. Each and all of those defenses are jurisdictional, in that if sustained the defendants would have judgment. The classification of some as jurisdictional and the others as ordinary defenses, so that the former must be tried by the judge alone and the latter by the jury, is, we believe, utterly foreign to the practice prevailing in Arizona.

As support for the proposition that the issues in question go to the jurisdiction of the court over the subject matter, the court cites:

*S. H. Kress v. Superior Court,* supra

This case was an application for a writ of prohibition against the Superior Court to prevent it from entertaining jurisdiction in a case where the complaint alleged that the plaintiff was a minor, age 13, was illegally employed by the defendant and not bound by an election to take Compensation through failure to reject the same. The substantial question in the case was whether an infant of that age, being illegally employed, could waive his right to a common law action against his employer. The court held that such

a minor was bound by the provisions of the Compensation Act and that his sole claim was one of Compensation under that Act.

It is true that the court granted a writ of prohibition but we call the court's attention to the last paragraph of the opinion in which, in apologetic language, the court points out that it would not ordinarily assume jurisdiction by writ of prohibition in a matter of that kind and did so only because of the exigencies of the case, which it pointed out. There is language in this case indubitably to the effect that a trial court ought not to assume jurisdiction of a suit by an employee against his employer where he alleges in his complaint facts showing clearly that he has no relief except under the Compensation Act. It is nevertheless clear that the Court was in serious doubt as to the jurisdictional feature of the case and proceeded only for the purpose of putting at rest the long delayed determination of the rights of infants in illegal employment.

Had the action in the *Kress* case been by a plaintiff alleging that he was an invitee of the defendant or that he as an employee was excused from making any election because of the failure of the defendant to post the notices required by law, or that the defendant had wilfully inflicted injuries upon him, (instances excusing an election), it would have been incumbent upon the defendant to raise the issue that the plaintiff was an employee insured under the Compensation Act. That would not defeat the jurisdiction of the court over the subject matter of the action, but would if sustained, defeat the action itself. In that sense it might be considered "jurisdictional." But that either party could demand a jury trial on the issue, we submit is clear under our Arizona practice.

In support of the proposition advanced by this court that the district court properly withheld these issues from the consideration by the jury, the *Weaver, Phelps* and *Oklahoma* cases set forth in the above quotation are cited.

In the *Weaver* case, supra, an eleven-year old child was injured while placing or kicking cantaloupes on a conveyor belt of Martori. Through a guardian ad litem he filed suit for damages in the Superior Court against Martori, alleging facts showing that he was Martori's employee and that he had not rejected the provisions of the Compensation Act. His counsel's theory, no doubt, was that a child of that tender age could not waive his right to sue his employer. Since under the *Kress* case this eleven-year old boy was deemed to have made an election to accept compensation, it is apparent that his case would have to be dismissed because of his presumed election—not for any jurisdictional reason. Martori removed it to the Federal Court which sustained his motion for summary judgment, the reason being as indicated above, and then the child through a guardian filed for compensation with the Commission. He lost out again because the court held he was not an employee. The court, however, rejected the Commission's contention that the infant had elected to sue at law because, it held, the guardian ad litem had no power to bind the infant to an election, though the infant himself could so bind himself by failing to reject the Compensation Act. Had the child in the first place through a guardian ad litem filed his suit on the basis of not being an employee (invitee, attractive nuisance, etc.), the Court would have surely had jurisdiction even though defendant had pleaded the contrary. After all this litigation, he no doubt still had that

right, and to a trial by jury if the issue of election were raised.

The *Phelps* case was a mandamus by the State of Arizona to Judge Phelps, then on the Superior bench, that he proceed to try a criminal matter which he thought was beyond his jurisdiction. The court took the other view and said, among other things, that the first duty of the court is to determine whether it has jurisdiction.

We think it not inappropriate to call to the court's attention the court's discussion of "jurisdiction."

> 67 Ariz. 215 at 220, 193 P.(2) 921 at 925.
>
> "In Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 P. 203, 206, L.R.A. 1916E, 303, this court said: 'The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong. (Citing cases.)'
>
> "In this *Tube City* case our court quoted with approval from Manley v. Park, 62 Kan. 553, 64 P. 28, as follows: 'Jurisdiction over the subject-matter' is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or, under the particular facts, is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. * * * By 'jurisdiction over the subject-matter' is meant the nature of the cause of action and, of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * The power to determine and decide a case includes the power to decide

it wrong as well as to decide it right. See also Bates v. Mitchell, 67 Ariz. 151, 192 P.2d 720."

The *Oklahoma* case, supra, is concededly similar to our own—a suit allegedly against one not in the same employ. The defendants sought to show that the plaintiff had made an election to take compensation under the Act. It was contended that the trial court erred in refusing to so hold and also erred in refusing to submit the question to the jury. The decision of the court on that subject is as follows:

> "(1) A trial court is required to determine the legal question of whether or not it has jurisdiction of the subject-matter of an action presented to it for determination. If it does not have jurisdiction of the subject-matter of the action, it cannot legally impanel a jury to submit any question to a jury. It is neither authorized nor required to submit to a jury the question of whether or not it has jurisdiction of the subject-matter of an action." 19 P.(2) 571

It may be that the court had in mind that a disputed issue of fact on the question of election was for the judge alone to determine but we suggest that a reasonable conclusion may be derived from the opinion that there was no dispute in the evidence on that score. See discussion under paragraph (2) of the opinion. In any event this *Oklahoma* case has no binding force in Arizona. Surely here, in a case of this sort, there can be no question of the right to impanel a jury. No doubt, there are many points of similarity in the constitutions and laws of the two states on this subject but there are many points of difference and we do not think the law on this important subject should be announced for the courts of Arizona on the basis of an *Oklahoma* decision.

This is not an action by an employee against his employer—both subject to the jurisdiction and order of the Industrial Commission, unless the employee has affirmatively rejected the Act. An alleged stranger to the employment relation is involved. When he pleads that the plaintiff was in the employ of another and affirmatively elected to take compensation from him or his insurer, he is doing no more than alleging that the plaintiff does not own any cause of action against the defendant. The court went to extreme lengths in the *Kress* case (apologetically) and surely will not extend the jurisdictional theory further.

From the case of *Moseley v. Lily Ice Cream Company,* 38 Ariz. 417, 300 Pac. 958, we quoted in our opening brief at page 33. That was an action against a third party in which the defendant undertook to claim that the plaintiff had made an election to accept compensation from his employer. The plaintiff countered his purported election was not binding upon him. The court declared an election "made in a case of this nature just as in any other case is subject to be set aside for many reasons. But this issue must be raised by the pleadings." The decision of election in other cases would, of course, be for the jury and not the court. Had the court contemplated that it was for the judge alone to decide, and not the jury, (heresy in Arizona) it would certainly have said so.

### The Issues Should Have Been Left to the Jury Whether They Were Jurisdictional or Not

Even if we assume that the court is correct in saying that the jurisdiction of the court over the subject matter depended upon its conclusion that the Plaintiff, John Hubbell, and these defendants were not in the same employ and

that no election of remedies had been made, it does not follow, we respectfully submit, that those issues should have been left to the determination of the court alone. On the contrary, we believe the general rule is applicable here. It is well stated in 21 C.J.S., Courts, Section 112, Page 170:

> "The question of jurisdiction will be determined without regard to hardship or the merits of the case, and, in general, so as to sustain the court's jurisdiction where possible. It is to be determined in the first instance from the pleadings, being primarily a question for the court, although disputed questions of fact are for the jury. One who seeks action by a court has the burden of demonstrating its jurisdiction to grant the relief sought."

The right to a trial by jury is jealously guarded in Arizona. In all actions whether sounding in law, or in equity, the parties are entitled to have disputed issues of fact submitted to the jury. The verdict of the jury has the same binding effect in common law actions as it has at common law; and while the court may disregard the verdict of the jury in an action sounding in equity, it must nevertheless at the demand of a party submit the issues of fact to the jury, and "harken" to its conclusion.

*Mounce v. Wightman,* 30 Ariz. 45, 243 P. 916

We respectfully submit therefore that the District Court had jurisdiction of the subject matter of this action at all times from the inception of the removal proceedings; that the issues of identical employ and election of remedy were like all the other issues of fact in the case, for the determination of the jury; that the distinction made by this Court between those issues of fact and the others, so far

as the right to a jury trial is concerned, runs counter to the constitution of the United States (7th Amendment) and to the Constitution, laws and decisions of Arizona.

A rehearing is respectfully requested.

Dated: April 11, 1951.

CONNER & JONES
By GERALD JONES